CF0000063206

(2)

Chh.

Single Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR

Criminal Appeal No. 577/2000

APPELLANTS (IN JAIL) : 1. Khomlal Sahu S/o Trilochan Sahu aged about 37 years, Occupation- Cultivator;

2. Shiv Kumar S/o Trilochan Sahu, aged about 24 years, Occupation- Cultivator;

Both residents of Mandhar Basti, P.S. Dharsavan, District Raipur, M.P.

Vs.

RESPONDENT : The State of M.P. through Excise Department, Raipur, M.P.

Filed on 26/12/2000 by Shri A.P. Yadav Advocate Adv. A.R.

MEMO OF CRIMINAL APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE

Cr. Appeal / Revision

(21)

Criminal Appeal No. 577/2000.

1). Khomlal Sahu

2). Shiv Kumar ... Appellants

Vs.

The State of Madhya Pradesh
(Now Chhattisgarh) ...Respondent

****

Judgment

Post it for 1/08/2001.

Sd/-
R.S. Garg
Judge
31-07-2001.

(29)

HIGH COURT OF CHHATTISGARH AT BILASPUR.

Criminal Appeal No.577/2000.

1. Khomlal Sahu
2. Shiv Kumar ... Appellants.

Vs.

The State of Madhya Pradesh,
(Now Chhattisgarh) ... Respondent.

* * * * * * *

Judgment

Hon.Shri R.S.Garg, J. :

The appellants being aggrieved by the judgment dated 31.1.2000, passed in Special Case No.48/99, by the Special Judge (N.D.P.S.),Raipur, convicting the appellants under Section 8 read with Section 20(b)(i) of the N.D.P.S.Act, sentencing each of them to undergo R.I. for 3 years and pay fine of Rs.5,000/- each; in default of payment of fine to undergo further R.I. for five months, have filed this appeal.

2). The prosecution case in brief is that on 17.4.99, Anil Sachan, Sub-Inspector of Excise (Circle No.2), while on patrol received an information that in a residential house situate at Gandhi Chowk of village Mandhar, one Trilochan Sahu and his two sons (Present appellants) were engaged in business of Narcotics/contraband ganja. Said Anil Sachan recorded the information in register at Sl.No.2, sent the information to the District Excise

Officer, Raipur, after forming an opinion that if awaited warrant that Narcotics could be removed, he proceeded towards the place. After reaching the said house, he called the in-mates to come out; on which, appellant, Khomlal Sahu came out and informed said Anil Sachan that Trilochan Sahu had gone to some-where out. He, however, informed that Shivkumar (Co-accused) was present in the house. They also informed the police officer that the house was jointly owned and occupied by Trilochan Sahu and the present appellants-sons . Anil Sachan gave them the information about his suspicion and also informed them that if they wanted, the house could be searched in presence of the gazetted officer or a Magistrate. The accused persons called Nand Kumar and Mithlesh Kumar. After arrival of those persons, Anil Sachan issued them a notice for search of the house. The accused persons consented for the search and thereafter the search was taken. When they reached in the last room situate in the Court-yard and the doors were opened; to the surprise of all 7 bags containing contraband ganja and 24 small paper packets each containing 10 gms. ganja were found. Four samples of 50 gms. each were drawn and were properly sealed. Seizure memo was also prepared on the spot. A spot-map in the presence of the accused persons were prepared . The accused persons and the contra-bands were brought to the office of the District Excise Officer. The sealed goods were kept in the Malkhana and thereafter with the help and assistance of Patwari; yet another spot map was prepared. One

sealed sample was sent to the F.S.L., Neemach. The report received from F.S.L. informed that the sample was of ganja. On completion of the investigation, the challan was filed. As the accused persons denied the commission of the offence, the prosecution agency produced the evidence in the Court and proper opportunity to lead evidence was also given to the accused persons. The accused in their defence examined D.W.1 Ashwani Kumar.

3). After recording the evidence and hearing the parties, the learned trial Court convicted and sentenced the appellants as referred to above, and the appellants being aggrieved by the said judgment, conviction and sentence, have filed this appeal.

4). Smt. Kiran Jain, learned counsel for the appellants submits that from the evidence available on the record it would clearly appear that the house was in exclusive possession of Trilochan Sahu, father of the appellants, and as the appellants were living separately, they could not be held liable in connection with possession of the contrabands. It is also submitted by her that from the statements of the defence witnesses it is clearly proved that the prosecution has failed to prove the exclusive possession and control over the house, therefore, also, the appellants deserve to be acquitted.

5). Shri Ranbir Singh, learned counsel for the State taking an exception to the argument submitted that from the statements of the witnesses it would clear appear that the accused persons

were in joint and conscious possession of the house and as they were living jointly and the contrabands were found in the residential premises of the accused persons, they have been rightly convicted by the Court below. He has prayed for dismissal of the appeal.

6). I have heard the parties at length and have perused the records.

7). The prosecution agency examined as many as six witnesses in support of its case. P.W.1 Jeev Rakhan is the village Kotwar, P.W.2 Mithlesh Kumar, P.W.3 Nand Kumar, as narrated above were called by the accused persons; P.W.6 Anil Sachan is the Excise Sub-Inspector and the Seizure Officer, P.W.4 B.L. Mandavi is the District Excise Officer, while P.W.5 Neelkant Verma was the Patwari of the village at the material time. P.W.2 Mithlesh and P.W.3 Nand Kumar though admitted their signatures on Ex.P/1 to Ex.P/7, but did not support the prosecution case. They,however, stated that they were called by the Officer of the Excise Department and were required to affix their signatures on the documents which were kept prepared. P.W.2 Mithlesh Kumar,however, stated before the Court that the Excise people asked him to affix his signatures,therefore, he had affixed the same. He,however, admitted that he was informed by the Excise people that they had seized ganja and the witness could affix his signatures as seizure witness. P.W.3 Nand Kumar is the village Sarpanch. Despite admitting the

fact that the documents should not be signed without reading the same, he stated that as he was in hurry, he has signed the said documents. In cross-examination- paragraph 10, the defence asked him about the ownership, but P.W.3 Nand Kumar clearly stated that he did not know as to who was the owner of the house. He,however, also stated that he did not know since when the accused persons were living with their father Trilochan Sahu.

8). P.W.1 Deev Rakhan stated before the Court that after receiving the information about the arrival of the police people, he went to the house of Trilochan Sahu. He was informed by the Excise people that they had seized the Narcotics and were making the seizure. He stated before the Court that on mere asking of those officers he had affixed his signatures. In the leading question submitted to him by the prosecution he denied the material suggestion of the prosecution, but however, in paragraph 4 stated that since after being appointed as Kotwar he had seen the present appellants living in the same house with their father Trilochan Sahu. However, immediately after making this statement he tried to wriggle out of the same by saying that the house belonged to Trilochan Sahu and since after the marriage of the appellants they were living separately in different rooms of the same house. He also admitted his signatures on Ex.P/1 to Ex.P/7.

9). P.W.6 Anil Sachan stated before the

Court that he received the information at Camp-Siltara which was immediately recorded by him. The said record has been produced by him at Ex. P/15. He has also proved the fact that he sent a copy of the information to the District Excise Officer under Ex.-P/9. Supporting the prosecution case, he stated that when they reached the house in question, he called the in-mates to come out, on which Khomlal came out and thereafter he also found Shiv Kumar in the house. They were informed that the house was to be searched as the Excise Sub-Inspector was of the opinion that the contra-bands were stored in the said house, thereafter Nand Kumar, Mithlesh and Kotwar of the village were called at the instance of the accused persons. Notice Ex.P/16 to comply the provisions of the Act, was given to them, on which consent of the accused was obtained under Ex.P/1. After obtaining the consent of in-mates of the house, they entered in the house after giving their personal search; when the raiding party reached a pakka room situate in the Court-yard of the said residential premises, he found that a latch was put on the same and on his enquiry he was informed by the accused persons that it was used for the purposes of Nistar (Lavatory/Bath-room). The said room was opened and he found that seven bags each containing ganja were kept there. Just next to the said bags, 24 small paper packets each containing ganja were also found, a big and small

balance were also found. A small packet was opened and it was found that these packets were also contained ganja. The articles were weighed at Fuel Wood Depot of the accused persons. Four samples of 50 gms. each were drawn on the spot, the same was sealed and Panchnama Ex.P/4 was prepared. On the said panchnama signatures of the accused and witnesses were obtained and Weighment panchnama Ex.P/6 was prepared and the seizure memo Ex.P/9 was also prepared in presence of the accused persons and witnesses and their signatures were also obtained on these documents. Under Ex.P/7 he prepared the Spot map. After putting the proper seal on the seized articles he proceeded towards the head-quarters. After coming to the Head-quarters he gave the information to the District Excise Officer and submitted the sealed articles and other articles to the District Excise Officer. With the permission of the District Excise Officer, the articles were kept in Malkhana and one of the sample was sent to the F.S.L. He also produced the Malkhana register containing the said entry. The First Information Report was recorded at Ex.P/10. After some time he required the village Patwari to prepare spot map which was accordingly prepared by the Patwari under Ex.P/11. The sample was sent to the F.S.L. along with the letter Ex.P/19. The report received from Neemach laboratory was produced by him at Ex.P/21. In the cross-examination he stated that in Ex.P/15 he had recorded the name of Trilochan Sahu and further recorded that his

sons were also engaged in the said business. He, however, admitted that as the names of the sons were not informed to him he did not record the names of the sons. He also admitted that he did not inform the village Kotwar before entering in the village nor did he take any person with him to reach the house in dispute. In paragraph 15 he admitted that the fine details such as reaching to the house, calling out the in-mates etc.. were not detailed by him in the F.I.R. as according to him all was not required to be mentioned in the F.I.R. In paragraph 17 he denied the suggestion that signatures of the accused persons were obtained on Ex.P/1, P/3 and P/16 without telling them the contents of the said documents. He also denied the suggestion that when he reached the house, the accused were not available, but the accused persons were called from another Mohalla, Bhatapara. It would be worth noting that not even a single suggestion was given to him that the house did not belong to the accused persons and was owned and exclusively possessed by Trilochan Sahu. From the statements of P.W.6 Anil Sachan it would clearly appear that the accused persons were found in the house. Accused Khomlal came out on the call of Anil Sachan and thereafter another accused was also found in the very same house. From the statements of Kotwar, it would again appear that all the three persons were living in the same house. From the documents it would appear that about 46 kg. ganja was found kept

in seven bags and 240 gms. ganja was found kept in 24 small paper packets and a big balance and small balance for the purposes of weighing the articles were also found in the room. From these documents and the recoveries, it would clearly appear that small packets of 10 gms.each after weighing the contrabands were prepared and were stored for the purpose of selling. It would be necessary to note at this stage that the quantity of ganja would rule out every possibility of false implication. The quantity is not so small that it could be planted by the raiding party without notice of the same to any-body.

10). P.W.4 B.L.Mandavi, the District Excise Officer had proved the information which was received by him and had also proved other documents. In the cross-examination he admitted that as he was not present on the spot he could not say anything about the seizure etc.. P.W.5 Neelkant Verma- Patwari, of Halka No.90 stated before the Court that he had prepared the spot map. The same was prepared by him after receiving the information from the witnesses, Sarpanch and others. He also admitted that the room from which contrabands were recovered belonged to Khomlal and Shivkumar. In the cross-examination, he,however, admitted that in absence of records he was unable to say that the house stood recorded in the name of Trilochan Sahu. He also denied the suggestion that the accused Shivkumar and Khomlal were living

separately in Mohalla- Bhatapara. It would,however, be note-worthy that the accused persons did not produce any document to this witness to show that they were living in Mohalla-Bhatapara. He denied the suggestion of the defence that he was not informed by Sarpanch,Kaliram,xxx Jeevanlal and Gokaran that the house belonged to the accused persons. He also denied the suggestion that these four persons had informed that the house belonged to Trilochan Sahu.

11). D.W. 1 Ashwani Kumar is the Panchayat Secretary. He stated in the Court that the accused persons were living in Mohalla-Bhatapara. He, however, admitted his signatures on Ex.P/13- the report submitted by Patwari along with the spot map. Though, he is Panchayat Secretary, but the accused persons did not require him to produce the documents which could show that the house stood in the name of Trilochan Sahu alone or the accused persons owned and possessed some other house in Mohalla-Bhatapara. Contrary to his signatures at Ex.P/13 and P/14, he stated that when he arrived on the spot the documents were kept ready and he simply signed the same. He also admitted that Trilochan Sahu had left the village since last five years, but, however, in the next breath stated that on the date of incident Trilochan Sahu was available in the village. He also admitted the fact that when Trilochan Sahu was not in the village, one of the accused was

taking care of the house. From the statements of defence witness Ashwani Kumar it would again appear that he had affixed his sigantures on Ex.P/13 and P/14. In the opinion of this Court, his statement that he had affixed his signatures on the proper documents without reading the same cannot be relied upon. It is not expected of a Panchayat Secretary that without understanding the contents of the documents he would simply affix his signatures . Apart from this, he has given a death blow to the defence of the accused that the house was in exclusive possession of Trilochan Sahu; the cat came out of the bag when this witness stated that Trilochan Sahu was not seen in the village for the last five years and one of the accused was looking after the said house . His submission that on the date of incident Trilochan Sahu was present in the village would not assume any importance because not even a single witness has said that on the date of the incident Trilochan Sahu was present in the village. If this was a truth, then, the immediate conduct of the accused persons at the time of search and seizure would have been to inform to the Excise Officers that Trilochan Sahu was available in the village and he could be called. Even hostile witnesses do not say that Trilochan Sahu was present in the village.

12). I find no reason to dis-believe the statements of P.W.6 Anil Sachan, when he says that

on his first call the accused Khomlal came out of the house and thereafter the accused Shivkumar came out of the house. The signatures of the accused persons are available on each of the documents. Their signatures, in view of the statements of Anil Sachan and even the hostile-witnesses would show that the search and seizure were effected in presence of the accused persons.

13). After going through the complete records, I am unable to hold that the accused persons were not residing in the house and they did not know about storing of contrabands; availability of small and big balance would also fortify the allegations of the prosecution that the accused persons were actively engaged in the business of contraband ganja. I am unable to hold that the house simply belonged to Trilochan Sahu and the present appellants have been falsely implicated. The learned Court below was justified in recording the conviction of the appellants.

14). At this stage, learned counsel for the appellants submits that the appellants are in jail since 18.4.99 and as they have undergone the substantial sentence of two years and three months, the jail sentence be reduced to the period already undergone.

15). Taking into consideration the quantity of the ganja and the fact that maximum awardable punishment for dealing in ganja is five years and

further taking into consideration that the Court below has awarded only three years jail sentence, I do not consider present to be a fit case for reducing the sentence to the period already undergone. The Court below has awarded legal and proper sentence.

16). I find no reason to interfere. The appeal deserves to and is accordingly dismissed.

Sd/-
R.S. Garg
Judge

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